Further Storm Warnings in the Territory of Retiree Health Care Benefits

Richard Whitmore and Cepideh Roufougar

Richard Whitmore *is a named partner in the labor and employment law firm of Liebert Cassidy Whimore.* ***Cepideh Roufougar*** *is an associate with the firm. LCW represents public agency management throughout California.* *The authors would like to thank LCW partner Steve Berliner for his assistance with this article.*

As reported in the last issue of *CPER*, the "storm" over post-retirement health care benefits is not going to abate anytime soon. As costs continue to rise and retirees live longer, public agency employers and employees are faced with a financial burden that few predicted and even fewer are currently able to meet. Changes in governmental accounting principles — namely the Governmental Accounting Standards Board's GASB 45 — have brought the issue and the costs associated with providing retiree health care benefits to the forefront.

In "Weathering the Gathering Storm Over Post-Retirement Health Care Benefits —Vested or Not," Jeff Sloan, Genevieve Ng, and Merlyn Goeschl did a thorough job of discussing GASB 45 and the perils of the "pay as you go" approach, particularly in the context of the County Employees Retirement Law (CERL) and the Meyers-Milias-Brown Act. This article continues the discussion to focus on public employers that are covered by the Public Employees' Medical and Hospital Care Act (PEMHCA). A solution to the retiree health care debacle may prove even harder to find under the PEMHCA's more rigid statutory scheme.

What Are Retiree Health Care Benefits?

Pensions are the most widely known post-employment benefit provided by employers. Retiree health care benefits are the most common form of *other* post-employment benefits (OPEBs) provided by employers. Retiree health care benefits are generally established through a promise by an employer to provide an employee with a certain level of continued benefits upon retirement. Employees work for an employer for a number of years with the expectation that the employer will fulfill this promise of providing continued benefits.

For many public employers, the promise of retiree health care benefits is found in collective bargaining agreements, personnel policies, or resolutions or ordinances passed by the agency's governing body. The details of this promise, including the manner in which it is made and the exact language used to convey the benefit, all affect the employer's obligation toward its employees. For those public employers who are covered by the Public Employees' Medical and Hospital Care Act (PEMHCA),[1] the promise of retiree health care benefits is found, not only in the documents described above, but also in the statutory provisions of the PEMHCA.[2]

Why Are Retiree Health Care Benefits a Hot Topic?

In California, the cost of public pension benefits are funded traditionally through a combination of employer and employee contributions that are made on a regular basis during the term of an individual's employment. These regular contributions then are invested until such time as distributions occur in the form of pension payments. This method of funding pension benefits is commonly described as "pre-funding." Pre-funded contribution amounts are determined by an actuarial analysis of the financial status of the pension plan.

In sharp contrast, most retiree health care benefits have not been pre-funded. Instead, many public employers fund these retiree health care benefits on a "pay-as-you-go" basis. In other words, employers fund retiree health care benefits only in those years in which the benefits actually are being provided to a retiree. Thus, unlike traditional pension plans, neither the employer nor the employee contributes money to pre-fund retiree health care benefits before those benefits are provided.

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New governmental accounting standards have focused attention on the issue of retiree health care benefits. Under Statement Number 45, issued by the Governmental Accounting Standards Board, public employers now are required to measure and report those costs associated with providing retiree health care benefits, and any other OPEB. Application of this new reporting requirement is being phased in, based on the total annual revenues of a governmental agency.[3] The stated purpose of this reporting requirement is to:

> ...improve[ ] the relevance and usefulness of financial reporting by (a) requiring the systemic, accrual-basis measurement and recognition of OPEB cost (expense) over a period that approximates employees' years of service and (b) providing information about actuarial liabilities associated with OPEB and whether and to what extent progress is being made in funding the plan.[4]

GASB 45 requires only the *reporting* of unfunded OPEB liabilities. It does not require that employers immediately begin funding those liabilities. However, as a result of the GASB 45 reporting requirements, many public agencies have to examine the true costs of retiree health care benefits, including the costs of continuing to provide benefits to future retirees. As the number of retirees grows each year, almost all public employers can expect eventually to be paying more for health care benefits for their retirees than for their current employees.

To highlight the cost of providing retiree health care benefits, on May 7, 2007, the State of California reported that for the 2007-08 fiscal year, the state alone will spend approximately *$1.4 billion* to provide those benefits to retired state employees and their dependents. In addition, the state reported an unfunded liability of approximately $48 billion for future retiree health care benefits.[5] While the financial liabilities faced by individual local agencies are not as great as the liabilities faced by the state, individual agencies that have not pre-funded may be looking at liabilities totaling in the tens of millions and hundreds of millions of dollars.

Before discussing the limited actions that public agency employers can take to reduce the unfunded liabilities that must be reported under GASB 45, it is helpful to look at how retiree health care benefits are treated under both the general legal theories of vesting and in specific retirement statutes.

How Retiree Health Care Benefits Are Treated Under the Law

The California Supreme Court has long held that "public employment gives rise to certain obligations that are protected by the Contracts Clause of the Constitution, including the right to the payment of salary that has been earned."[6] Anticipated pension benefits have been described as "an integral portion of contemplated compensation."[7] Thus, a public employee's right to "pension" or "retirement benefits" is one such protected obligation.[8]

The legal theory for granting constitutional protection to a public employee's pension rights is based on the concept of vesting.[9] The courts have held that the right to pension benefits vests upon employment.[10] This holds true even if an employee has not satisfied the prescribed service period for receiving a full benefit.[11] The California Supreme Court has described the interplay of vesting for purposes of receiving a benefit and vesting for purposes of determining the amount of that benefit, along with the contractual nature of vesting generally, as follows:

> It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. [Citations.] He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due.[12]

> *In* Thorning, *the state appellate court held that retiree health care benefits vest in the same manner as pension benefits.*

In other words, once an employee begins work for a public agency that provides pension benefits, the employee and the employer automatically enter into a constitutionally based "contract" for those benefits. The full benefit to be received by an employee will depend on the employee's satisfaction of certain terms, which generally include a requirement that the employee perform services for a pre-identified period of time. A public agency employer that changes the terms of this contract while the employee is engaged in satisfying the requirements to receive the full benefit of the contract may be deemed to have unconstitutionally impaired its "contractual" obligation to the employee.

So far, the discussion has focused on the legal treatment of traditional pensions; but what about retiree health care benefits? Are retiree health care benefits and other OPEBs treated in the same manner as traditional pensions? In one published California decision, the Court of Appeal answered this question in the affirmative, and held that retiree health care benefits do vest in the same manner as pension benefits. The case, *Thorning v. Hollister School Dist.*,[13] arose from a decision by a school district to discontinue paying health benefits to retiring school board members. In *Thorning*, the court decided that once the school board had adopted an "official declaration" of policy that provided fully paid health benefits to retired board members who had served a specified number of years, the school board could not suspend payment of those benefits as to those members who had retired while that policy was in effect.

Making Changes to Vested Benefits

Once a public employee has vested in the right to a certain benefit, that benefit may not be altered without impairing the employer's contractual obligation.[14] However, the existence of this contractual obligation does not mean that an employer may never change the type or level of benefits provided. In fact, over time, many employers have increased retirement benefits. But what about an employer who attempts to reduce benefits? To answer this question, it is helpful to look at the very limited manner in which courts have allowed employers to change pension benefits.

Circumstances in Which Changes Can Be Made

Once a retirement benefit has vested in an employee, it may be reduced in only two limited circumstances. The first circumstance occurs when both parties agree to the change. After all, there is no impairment of a contract if both contracting parties mutually agree to the change in contract terms.[15] This mutual agreement may become especially important when the change being made affects individuals who are currently retired. Since the theory of vesting is based in contracts, an employer seeking to change the vested benefit of a group of retirees presumably will need to enter into a new contract with each and every one of the retirees affected.

The second circumstance in which a change to a pension benefit may be implemented occurs when, *prior to the time of retirement*, the employer makes reasonable modifications to benefits to maintain the integrity of the pension system.[16] The reasonableness of a modification is determined on a case-by-case basis.[17] However, in order to be deemed "reasonable," the courts have held that (1) modifications "must bear some material relation to the theory of a pension system and its successful operation"; and (2) modifications "which result in disadvantage to employees should be accompanied by comparable new advantages."[18]

The courts have struck down modifications that are unrelated to the purpose and operation of a pension.

In order for a modification to be considered reasonable, both prongs of the test must be satisfied. A modification satisfies the first prong when it relates "to considerations internal to the pension system, e.g., its preservation or protection or the advancement of the ability of the employer to meet its pension obligations."[19] The courts have struck down modifications that are unrelated to the purpose and operation of a pension.

For example, in *Wilson v. City of Fresno*,[20] the Court of Appeal disallowed an amendment to a pension plan that terminated all pension rights upon conviction of a felony after retirement. In striking this amendment, the court held:

> The termination of all pension rights upon conviction of a felony after retirement does not appear to have any material relation to the theory of the pension system or to its successful operation. Rather, the change was designed to benefit the city and, as stated in the city's brief, to meet the objections of taxpayers who would be opposed to contributing funds for the maintenance of a pensioner who had been convicted of a felony.[21]

Although a modification may satisfy the first prong of the test, employers proposing to reduce a vested benefit may have difficulty satisfying the second prong. The judicially imposed requirement that reductions in vested benefits must be offset by "comparable new advantages" to employees can render any attempt to substantially reduce costs illusory. In determining if a modification results in a comparable benefit or comparable new advantage, the courts "must focus on the particular employee whose own vested rights are involved."[22] The courts will consider evidence of the effects of the modification and resulting benefit on the particular employees whose vested rights are involved in determining if the modification is permissible.

For example, in *Barrett v. Stanislaus County Employees Retirement Assn.*,[23] the Court of Appeal upheld a retirement board requirement that employees who were reclassified from miscellaneous members to safety members pay the difference in employee contributions between the two classes. The court held that the requirement to pay these arrears contributions was a permissible change because the cost of the arrears payments was far outweighed by the enhanced retirement benefit associated with receiving a safety retirement.

Similarly, in both *Townsend v. County of Los Angeles*[24] and *Amundson v. Public Employees' Retirement System*,[25] the courts upheld modifications to pension plans that related to changes in retirement ages. In *Townsend*, the court upheld a modification that reduced the mandatory retirement age from 70 to 65. This change was offset by an increase in the percentage of benefits provided for each year of service, which resulted in enhanced benefits. In *Amundson*, the court upheld a modification that imposed a later retirement age. The court held that the disadvantage of the later retirement age was offset by a decreased employee contribution and a substantially higher pension upon retirement.

The Language of the Benefit Could Be Key

Before an agency looks at modifying retiree health care benefits, it first should look to its contractual obligation. The exact terms of that obligation will impact the employer's ability to make changes. The courts will interpret the language that created the benefit when evaluating the permissibility of a modification.

In 2004, the court issued a decision allowing an employer to limit the health care benefits it offered retirees based on the language of the agreement that authorized the benefit. In *Sappington v. Orange Unified School Dist.*,[26] the district had been providing retirees fully paid PPO and HMO plans for 20 years. Due to increasing health insurance costs, the district decided to require a contribution for the PPO plan. However, the district continued to provide fully paid HMO benefits. The retirees filed suit, alleging that the district was obligated to continue providing fully paid PPO benefits.

In support of their position, the retirees relied on language in a district policy that stated, "The District shall underwrite the cost of the District's Medical and Hospital Insurance Program for all employees who retire from the District provided they have been employed in the District for the equivalent of ten (10) years or longer."

In finding for the district, the court in *Sappington* held that the language relied on by the retirees required only that the district provide some type of insurance coverage, not a specific type of coverage. The court held that the district's actions in providing full coverage for both HMO and PPO plans did not create a contractual obligation to do so, stating, "Generous benefits that exceed what is promised in a contract are just that: generous. They reflect a magnanimous spirit, not a contractual mandate."[27] Thus, based on the language of the policy, the court found that the district's decision to provide only fully paid HMO benefits did not constitute an impermissible change.

Employers who provide retiree health care benefits under CERL may have much more flexibility in reducing or eliminating benefits.

Comparing Retirement Laws

One of the sources for determining the scope of a benefit will be the statute under which that benefit is provided. Depending on the applicable retirement law, this statute may allow an employer to take action to modify, or even eliminate, a vested benefit. As described below, the two statutory schemes under which most public agency employers provide retiree health care benefits are very different. Employers who provide retiree health care benefits under the provisions of the County Employees Retirement Law may have much more flexibility with regard to reducing and/or eliminating retiree health care benefits. In contrast, employers covered by provisions of the PEMHCA may be more limited and face greater obstacles.

Specific vesting rules under the CERL. Government Code Sec. 31691 allows for the provision of retiree health care benefits by two different methods. Under Sec. 31691, benefits can be provided either by an ordinance or resolution adopted by the governing body of an agency covered by the CERL, or by action of a board of retirement (the trustees of a retirement plan under the CERL).[28]

The ability of an employer to reduce or eliminate a retiree health benefit granted under Sec. 31691 is expressly addressed by the CERL. Specifically, Sec. 31692 states:

> The adoption of an ordinance or resolution pursuant to Section 31691 *shall give no vested right* to any member or retired member, and the board of supervisors or the governing body of the district may amend or repeal the ordinance or resolution at any time except that as to any member who is retired at the time of such an amendment or repeal, the amendment or repeal shall not be operative until ninety (90) days after the board or governing body notifies the member in writing of the amendment of repeal. In counties with a population of 5,000,000 or more, the adoption of an ordinance or resolution pursuant to Section 31691 shall remain in effect for any member heretofore or hereafter retired for as long as the board of supervisors or governing body provides similar types of benefits to any active member in current county service. [Emphasis added.][29]

While there currently are no published cases discussing application of Gov. Code Sec. 31692, this may change as more and more agencies look to reduce or eliminate retiree health care benefits and agencies attempt to take advantage of this statute. For example, on May 17, 2007, the board of supervisors for the County of Sacramento voted to eliminate retiree health care benefits for approximately 12,800 current employees but left benefits unchanged for current retirees.[30] Whether the affected employees will seek judicial review of the county's actions and whether the county's action will be upheld remains to be seen.

Issues unique to PEMHCA covered agencies. The statutory requirements relating to retiree health benefits for those agencies covered by the PEMHCA vary significantly from the CERL. Under the PEMHCA, employers have two options for providing those benefits: either under the equal contribution rule or pursuant to a vesting schedule.[31] Each option poses unique issues for public employers.

Under the PEMHCA, employers can provide retiree benefits either under the equal contribution rule or pursuant to a vesting schedule.

The equal contribution rule requires that an employer's contribution under the PEMHCA "shall be an equal amount" for both employees and retirees.[32] Employers who provide benefits under the equal contribution rule are required to provide a minimum contribution of $80.80 per employee and retiree during calendar year 2007, and a minimum contribution of $97 per employee and retiree during calendar year 2008. Beginning in 2009, this minimum contribution will be adjusted annually.[33]

The effect of the equal contribution rule is, in essence, to decrease an employer's ability to reduce retiree health care benefits. This barrier exists even if the employees were to agree to the reduction and the reduced contribution amount satisfies the minimum contribution requirements. The effects of the equal contribution rule are most obvious when considering a common technique used by employers to reduce pension liabilities, namely the creation of a second tier of benefits that will be applicable only to future employees. Since current employees and current retirees must receive the same contribution amount under the PEMHCA, a tier that provides some employees a lesser contribution than retirees appears to violate the equal contribution rule. Employers subject to the PEMHCA that seek to create multiple benefit tiers may face legal challenges from new employees who are hired and provided benefits at the lower levels.

As an alternative to the equal contribution rule, employers covered by the PEMHCA might consider adopting a vesting schedule.[34] Under this option, the actual contribution paid on behalf of each retiree for health care benefits need not be equal to current employees or other retirees. Instead, the actual contribution paid to a retiree is determined by the individual's years of service. The vesting schedule provides that an employee who has 10 years of service credit at the time of retirement is entitled to receive a benefit equal to 50 percent of the employer's contribution towards retiree health care benefits upon retirement. Employees receive an additional 5 percent of contribution for each additional year of service after 10 years of employment. Thus, employees who retire with 20 or more years of service are entitled to receive an amount equal to 100 percent of the employer's contribution for health care benefits.

Under a vesting schedule, the actual contribution paid to a retiree is determined by the individual's years of service.

Employers considering a vesting schedule should be aware of two issues. First, a vesting schedule generally is applicable only to those individuals hired after the vesting schedule is adopted.[35] The retirement health care benefits of current employees or current retirees are generally not affected by the adoption of a vesting schedule. Thus, the adoption of a vesting schedule establishes a two-tier benefits program based on an individual's date of hire, with one level of future medical benefits for current employees and a different level of benefits for employee's hired after the date on which the vesting schedule is adopted. The creation of this two-tier benefits system through application of a vesting schedule is the only exception to the PEMHCA's equal contribution rule.

The second issue that employers should keep in mind regarding vesting schedules is the effect on the required employer contribution. Contracting agencies that adopt a vesting schedule are required to provide a minimum contribution that satisfies the requirements of the 100/90 formula set forth in Gov. Code Sec. 22893.[36] This formula is dependent on the weighted average premium of the four largest health benefit plans offered under the California Public Employees Retirement System. Employers then are required to provide a contribution that is equal to at least 100 percent of the average cost of employee-only benefits. The employer contribution for dependents is an additional 90 percent of the weighted average for dependents. The employer contribution under this formula is adjusted annually.[37] Based on the formula, a maximum contribution is established. The applicable percentage of the maximum that must be paid to a retiree is determined by a retiree's years of service, as discussed above.

Based on increases in health care premiums, application of the 100/90 formula results in a required employer contribution amount that is higher than the minimum contribution amount set forth in Gov. Code Sec. 22892. Notably, because the 100/90 formula is based on PERS' premiums, the adoption of a vesting schedule by those employers that currently provide a fixed amount could result in unexpected increases in required contributions over time.

Finally, employers will need to consider the interplay between the equal contribution rule and a vesting schedule. Unlike the equal contribution rule that provides the minimum contribution for both employees and retirees, the vesting schedule option only addresses the minimum contribution that must be made for retirees. This leaves open the question of the minimum contribution for current employees of an employer who has adopted a vesting schedule. In answer to this question, employees are likely to assert that the equal contribution rule should be read in conjunction with the provisions that allow for adopting a vesting schedule. Thus, these employees can be expected to argue that the employer's contribution for current employees should be an amount that is no less than the maximum contribution amount required under the 100/90 formula for retirees. While there are no cases discussing the relationship between these statutes, this pro-employee approach to contributions appears to have been adopted by CalPERS in guidelines contained in a circular letter.[38]

Looking to the Future: What Can Public Employers Do?

Given that reducing or eliminating retiree benefits may be a difficult undertaking, many public employers are exploring a variety of options to help minimize the future impacts of benefits promised today.

One option is to maximize pre-funding of retiree health care benefits. By setting aside money now for future obligations, employers are able to take advantage of the financial benefits associated with long-term investing. In order to assist employers with the pre-funding option, CalPERS has created the California Employers' Retiree Benefit Trust Fund. In early May of 2007, the City of Thousand Oaks became the first public agency employer to participate in this newly created trust.[39]

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Another strategy being used by employers is to try to negotiate reduced benefits. Given the unique constraints of the PEMHCA, the ability to negotiate a reduction may be feasible only for employers covered by the CERL. This strategy of negotiating reductions has been successful for the County of Orange, which is covered by the CERL. The County of Orange has entered into agreements with the exclusive representative of most of its employees. Based in part on these negotiated changes, the County of Orange has been able to reduce its unfunded liability by more than one-half, from $1.4 billion to $598 million.[40]

Employers covered by the PEMHCA do not appear to have the statutory ability to do what the County of Orange did under the CERL. PEMHCA employers may want to consider pursuing statutory changes to the PEMHCA that would allow them to create multiple benefit tiers, either through unilateral action or through the meet and confer process.

Finally, other agencies are waiting to hear the recommendations of the Public Employees Post-Employment Benefits Commission before taking any major action. The commission was created by Governor Schwarzenegger and consists of 12 members: six, including the chairperson, appointed by the Governor, three appointed by the Speaker of the Assembly, and three appointed by the Senate President Pro Tem. The commission is responsible for preparing a report that (1) identifies the unfunded OPEB liability for California's governmental entities; (2) evaluates and compares approaches for addressing these unfunded liabilities; and (3) proposes recommendations for addressing these unfunded liabilities. The commission is required to provide this report to the Governor and the legislature by January 1, 2008.[41]

Conclusion

There are no easy solutions to reducing the growing costs of retiree health care benefits. No one approach will apply to all public employers since each faces unique obstacles. These obstacles include the financial status of each agency (including the amount of any unfunded OPEB liability), the language of the benefit provided, and the statutes by which the agency is governed. These factors, combined with the increasing costs of premiums, the decreasing levels of plan benefits, and the real pressures that are placed on public employers, suggest there may be a long and difficult legal, financial, and emotional battle ahead. Only time will tell if public sector employers will be successful in reducing or eliminated retiree health care benefits. ❋

1 See Gov. Code Secs. 22750 et seq.

2 See Gov. Code Secs. 22892.

3 The effective date of GASB 45 for various public employers depends on an agency's annual revenue. GASB 45 began to take effect on December 15, 2006, for those agencies with total annual revenues of $100 million or more; after December 15, 2007, for agencies with annual revenues of $10 million or more, but less than $100 million; and after December 15, 2008, for agencies with annual revenues of less than $10 million. (*Id.*)

4 See GASB Summary of Statement 45, www.gasb.org/st/summary/gstsm45.html.

5 "Questions and Answers: California's First Retiree Health Valuation," dated May 9, 2007, Legislative Analyst's Office, http://www.lao.ca.gov/2007/ret_health_val/ret_health_val_050907.pdf.

6 *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 853.

7 *Id.*

8 *Miller v. State of California* (1977) 18 Cal.3d 808, 815-16.

9 *Kern v. City of Long Beach*, *supra*, 29 Cal.2d at 855.

10 *Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749; *Miller*, *supra*, 18 Cal.3d at 817.

11 *Kern v. City of Long Beach*, *supra*, 29 Cal.2d at 855.

12 *Ibid.*

13 *Thorning v. Hollister School Dist.* (1993) 11 Cal.App.4th 1598.

14 *Kern v. City of Long Beach*, *supra*, 29 Cal.2d 848, 852-53.

15 *Mulcahy v. Bardin* (1932) 216 Cal. 517, 526; See also *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1223 ("There can be no impairment of a contract by a change thereof effected with the consent of one of the contracting parties").

16 *Betts v. Board of Administration of PERS*, (1978) 21 Cal.3d 859, 864.

17 *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131.

18 *Betts v. Board of Administration of PERS*, *supra*, 21 Cal.3d at 864.

19 *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 666.

20 *Wilson v. City of Fresno* (1954) 42 Cal.2d 180.

21 *Id.* at p. 185.

22 *Betts v. Board of Administration of PERS*, *supra*, 21 Cal.3d at 864 (citing to *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 449-453).

23 *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593.

24 *Townsend v. County of Los Angeles* (1975) 49 Cal.App.3d 263.

25 *Amundson v. Public Employees' Retirement System* (1973) 30 Cal.App.3d 856.

26 *Sappington v. Orange Unified School Dist.* (2004) 119 Cal.App.4th 949.

27 *Id.* At 955.

28 See Gov. Code Sec. 31691.

29 Gov. Code Sec. 31692.

30 "Retiree Benefit Curbed" by Ed Fletcher, *Sacramento Bee*, May 18, 2007.

31 A variation of the equal contribution rule, referred to as the "unequal contribution rule," allows employers to provide retirees with a contribution that is less than the contribution provided to current employees, so long as employers' annually increase the amount provided to retirees until the employers contribution for retirees is equal to that of current employees. Since, over time, this variation will have the same effect as the equal contribution rule, the unequal contribution rule is not discussed for purposes of this article. Moreover, this method is likely available only for employers first contracting with CalPERS for health care benefits. See Gov. Code Sec. 22892(c).

32 See Gov. Code Sec. 22892(b).

33 *Id.*

34 See Gov. Code Sec. 22893.

35 See Gov. Code Sec. 22893(a)(1). However, pursuant to Gov. Code Sec. 22893, subd. (a)(6), an employer may choose, once per year, to allow any previously hired employees the option to elect to be subject to the vesting schedule.

36 Gov. Code Sec. 22893, subd. (a)(1).

37 *Id.*

38 See Guidelines issued by CalPERS in Circular Letter No. 600-006-02 regarding the repeal of Gov. Code Sec. 22825.5 and its replacement with Gov. Code Sec. 22893. ("For retirees and active employees, the employer's contribution may be the amount calculated using the 100/90 formula up to 100 percent of the total premium.")

39 CalPERS Press Release, dated May 7, 2007, titled "City of Thousand Oaks First to Join CalPERS Retiree Health Prefunding Plan."

40 "County's Retiree Medical Debt Reduced," by Peggy Lowe, *Orange County Register*, March 21, 2007.

41 Governor's Executive Order S-25-06.